

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 14/08/2003

Coram

The Hon'ble Mr. Justice P. SATHASIVAM
and
The Hon'ble Mr. Justice S.K. KRISHNAN

C.M.A. No. 1318 of 2001
and
C.M.P.No. 17364 of 2001

V. Maria Pushpa Janet Rajam,
mentally unsound, represented by her
father M. Varuvel. .. Appellant/Respondent.

-Vs-

G. Anantha Jeyakumar. .. Respondent/Petitioner.

Appeal filed under Section 47 of the Guardian and Wards Act, 1890 against the
decree and judgement of the Additional District Judge, Nagercoil in
G.W.O.P.No. 32/2001 dated 30-8-2001.

!For appellant :: Mr. D. Sadhasivan

^For Respondent :: Mr. G.S. Thampy
for M/s. Isaac Mohanlal

:JUDGMENT

(Judgment of the Court was made by P. Sathasivam, J.,)

The appeal is directed against the common order passed by the Additional
District Judge, Kanyakumari at Nagercoil dated 30-8-2001, made in O.P.Nos.
21/2001 and 32/2001 in and by which the District Judge dismissed O.P.No.
21/2001 filed for judicial separation under Section 22 of the Indian Marriage
Act and allowed O.P.No.32/2001 granting custody of the minor children in
favour of the applicant, namely G. Anantha Jeyakumar, respondent in this
appeal. Since the present appeal is directed only against the order granting
custody of the minor children made in O.P.No.32/2001, it is unnecessary for us
to narrate the facts relating to O.P.No.21/2001.

2. The case of the petitioner-husband is briefly stated hereunder:
For convenience, we shall refer the parties as arrayed before the District
Court. According to the petitioner, the marriage between him and the

respondent-wife was performed on 3-9-87 at Saint Antony's R.C. Church, Anthoniar Vattom, Thiruvithamcode as per Christian Roman Catholic rites. The respondent begot two children. The petitioner is practising as Homeopathy Doctor. He constructed a house for the benefit of their family and children. It was he, who incurred all the expenses for the birth of two children. The respondent-wife was forcibly taken from the matrimonial home on the ground that specialised treatment has to be given for her mental illness. The children are with the mother and grand-parents. In order to educate them in good school particularly in English medium, he sent a notice through his lawyer for sending his wife and children to his matrimonial home. However, the same was not acceded to. The respondent-wife was suffering from mental illness from 1996 and she is unable to understand anything, responsibilities etc.

3. The respondent-wife has filed a counter denying all the allegations made in the petition. Since the petitioner was not having enough income, she was driven out from his house with her children and her parents are taking care of them. Since he demanded money often, she left the matrimonial home and because of the attitude of her husband, she was forced to live with her parents along with her children. The house was constructed only with the help and assistance of her father and the contrary statement made by the petitioner is false and incorrect.

4. Before the Additional District Judge, the petitioner himself was examined as P.W.1 and marked Exs. P-1 to P-22 in support of his claim. On the side of the respondent-wife, one Varuvel was examined as R.W.1 and Exs. R-1 to R-7 were marked in support of her defence. The learned District Judge, after framing necessary issues and after considering the relevant materials, dismissed O.P.No.21/2 001 filed for judicial separation and allowed O.P.No. 32/2001, granting custody in favour of the petitioner-husband. As said earlier, only against the direction regarding custody of the minor children, the respondent-wife through her father filed the present appeal under Section 47 of the Guardian and Wards Act, 1890.

5. Heard Mr. D. Sadhasivan, learned counsel for the appellant and Mr. G.S.Thampy, learned counsel for the respondent.

6. The only point for consideration in this appeal is, whether the learned Additional District Judge is right in granting custody of the minor children in favour of the petitioner-father or whether the minor children have to be entrusted to the custody of the respondent-appellant herein in the facts and circumstances of the case?

7. There is no dispute that the respondent, mother of the children is mentally unsound and that is the reason she is represented by her father M. Varuvel. The petitioner being the father of the children is their natural guardian. If it is established that the father is a qualified person without any vices, he is entitled to be appointed as guardian for the minor children. Before considering the claim of both parties, it is useful to refer the

relevant provisions of Guardian and Wards Act, 1890 hereunder:

"Section 17. Matters to be considered by the Court in appointing guardian.-

(1) In appointing or declaring the guardian of a minor, the Court shall, subject to the provisions of this section, be guided by what, consistently with the law to which the minor is subject, appears in the circumstances to be for the welfare of the minor.

(2) In considering what will be for the welfare of the minor, the Court shall have regard to the age, sex and religion of the minor, the character and capacity of the proposed guardian and his nearness of kin to the minor, the wishes, if any, of a deceased parent, and any existing or previous relations of the proposed guardian with the minor or his property.

(3) If the minor is old enough to form an intelligent preference, the Court may consider that preference.

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(5) The Court shall not appoint or declare any person to be a guardian against his will.

Section 25. Title of guardian to custody of ward.- (1) If a ward leaves or is removed from the custody of a guardian of his person, the Court, if it is of opinion that it will be for the welfare of the ward to return to the custody of his guardian, may make an order for his return and for the purpose of enforcing the order may cause the ward to be arrested and to be delivered into the custody of the guardian."

It is clear from the above provisions that while appointing or declaring the guardian of a minor, the Court has to consider the welfare of the minor. What will be the welfare of the minor, the Court has to take note of the age, sex and religion of the minor, the character and capacity of the proposed guardian and his relationship to the minor, the wishes, if any, of a deceased parent. Further, if the minor is old enough to form an intelligent preference, understand what is happening in and around him that may also be considered in preference to other conditions. While appointing a guardian, the paramount consideration is that his appointment shall not be against the will of the minor. Now let us consider the various decisions referred to by Mr. D. Sadhasivan, learned counsel for the appellant. In *Kirtikumar Maheshankar Joshi v. Pradipkumar Karunashanker Joshi*, reported in AIR 1992 Supreme Court 1447, the Supreme Court, in the light of the fact that the father of the minor children is facing charge under Section 498-A I.P.C., that the ill-treatment of their mother at the hands of their father, and that they are very happy with their maternal uncle, and also considering the interest and welfare of the children, declined to hand over their custody to their father though he had preferential right to custody. In the case before the Supreme Court, the minor son and daughter were aged about 13 and 11 years respectively. After considering the details with regard to father as well as the maternal uncle of the minors and after examining both the minor children in person, after recording their statement and wishes, qualities of father and maternal uncle, concluded that,

"7... We are conscious that the father, being a natural guardian, has a

preferential right to the custody of his minor children but keeping in view the facts and circumstances of this case and the wishes of the children, who according to us are intelligent enough to understand their well-being, we are not inclined to hand over the custody of Vishal and Rikta to their father at this stage..."

However, the Supreme Court permitted the father to visit the maternal uncle's house and meet his children often. The Court has also given liberty to the parties to move for modification of the said order or for seeking any directions regarding the custody and the well-being of the minor children, if there is change in the circumstances or for the welfare of the children.

8. In *Kishore v. Manju alias Manjula*, reported in 199 9-III M.L.J. 269, a Division Bench of this Court has held that the willingness of the minor boy who is aged 14 years, is also to be taken into consideration because he has become sufficiently old even though a minor to come to a rational conclusion especially when a dispute is pending in court in regard to his custody between his father and mother.

9. In *Goverdhan Lal v. Gajendra Kumar*, reported in AIR 2002 Rajasthan 148, a Division Bench of Rajasthan High Court in similar circumstance has held that welfare and interest of son will be better served in custody of his maternal grand-parents than his father. In that case, the minor is aged about 14 years at the relevant time. After referring to the decision reported in AIR 1992 SC 1447 (cited supra), the Bench has concluded thus:

"10. True it is that father being a natural guardian of a minor child has a preferential right to claim custody of his son. However, in the matters concerning the custody of minor child, the paramount consideration is the welfare of the minor and not the legal right of a particular party. Though Section 6 of the Hindu Minorities and Guardianship Act, 1956 constitutes 'father' as the natural guardian of minor son or daughter, but that provision also cannot supersede the paramount consideration as to what is conducive to the welfare of the minor. For arriving at a just and proper decision, keeping in mind that welfare of child is the paramount consideration, we thought it proper to call the child and find out his wishes as to with whom he wants to live. Pursuant to the Court's order, boy Ashish, aged about 14 years was produced before us on 10-9-2001. On being asked as to with whom he wants to live, Ashish frankly stated that he is willing to live with his maternal grand father Goverdhan Lal and maternal grand mother Smt. Janki Bai. Thus, it appears that he was not interested to live with his father and in our opinion, rightly so, because since birth he has been happily living with the appellants' family, prosecuting his studies very well and that both father and son are foreigner to each other. We also tried to persuade the children to go and live with his father for some time but he refused to do so. On being talked to Ashish, we found him intelligent enough to understand his well being. There are catena of decisions of various High Courts and of the Apex Court, wherein, the principle has been recognised that in deciding the question of handing over custody of a Hindu minor, the welfare of the minor shall be the paramount consideration...."

The same view has been reiterated in *Govind Sahai Bagarhatta v. Santosh Mishra*, reported in AIR 2002 Rajasthan 96. Here also, the minor is aged about 10 years. The custody of minor was claimed for maternal grand-father as well as child's father. After talking to the children, assessment of their state of mind, keeping in view of the facts and circumstances of the case and wishes of the children, the Bench has concluded that Master Parijat's welfare and interest will be better served in the custody of his maternal grand-father, appellant No.1 in comparison to his custody with his father, with whom he never lived after the age of only 9 months. Therefore, the learned Judges were not inclined to hand over the custody of minor Parijat to his father at this stage. However, as observed in the Supreme Court case, the Division Bench has permitted the parties to move the Court for modification of the order regarding the custody and the well being of the minor, if there is change in the circumstances for the welfare of the children.

10. In *Ram Kawal Yadav v. Pratibha Yadav*, reported in AIR 2002 Madhya Pradesh 44, a minor aged more than 14 years was found unequivocally unwilling to reside with his father even for a short period and a learned Judge of the Madhya Pradesh High Court, taking note of the fact that the minor was living with mother and sisters for the past many years since birth, and also of the welfare of the minor, had not granted custody of the minor in favour of the appellant father.

11. In *Premchand Goel v. Sanjay Dalmia*, reported (20 02) 2 M.L.J. 399, K. Sampath, J., on consideration of the fact that the father of minor child-Piyush was facing criminal charges, that paramount consideration is welfare of the minor, by deviating the rule that father is the natural guardian, appointed the maternal grandfather as custodian of the minor child. The learned Judge has held that the legal rights of the father must be understood subject to the provisions of Section 17 of the Act, which says that the Court should be guided by the sole consideration of the welfare of the minor and what would be for the welfare of the minor must necessarily depend upon the facts and circumstances of each particular case.

12. All the above decisions clearly show that though father is the natural guardian, the said legal right is subject to the provisions of Section 17 of the Act which emphasises that the Court should be guided by the sole consideration of the welfare and wish of the minor.

13. Now let us consider the decisions referred to by the learned counsel for the respondent. Mr. G.S. Thampy, at the foremost, relied on a decision of the apex Court in *R.V. Srinath Prasad v. Nandamuri Jayakrishna*, reported in (2001) 4 Supreme Court Cases 71 wherein Their Lordships have held that neither affluence nor capacity to provide comfortable living should cloud the consideration by the Court. In *Jai Prakash Khadria v. Shyam Sunder Agarwalla* and another, reported in (2000) 6 Supreme Court Cases 598, the same view has been expressed by the Supreme Court. It was held that affluent of party seeking guardianship cannot be the sole criterion for making appointment. He further relied on a Single Judge decision of this Court in *Palanisami, N. v. A. Palaniswamy*, reported in 1998-3-L.W.529; in *Jayalakshmiammal v.L. Venkataramaiah* and another, reported in 1997-2-L.W. 143 ; and in *J. Velan v.*

G. Muthu and 3 others, reported in 1991-1-L.W. 643 wherein it was held that father has to be given preference. Absolutely there is no dispute with regard to the proposition. In one of the decisions, namely, 1997-2-L.W. 143 (cited supra), a learned Single Judge of this Court opined that enquiring the minors ascertaining their views, desire, etc., may not give a correct solution to decide whether a person is entitled to the custody of his children or not. We are unable to share the above view, since Section 17 of the Act not only contemplates consideration of welfare of the minor, but also emphasises that guardian should not be appointed against the will of the minor. If the minor is capable of understanding what is happening in and around, his education, future prospects etc., undoubtedly their views and desire have to be given weight and it is the responsibility of the Court to ascertain their desire in person. Before the Court below, the father of the minor children was examined as P.W.1 and Exs. P-1 to P-22 were marked to show that he is having a pucca residential house and all facilities. On the side of the respondent, one M. Varuvel, maternal grand-father of the children was examined as R. W.1 and also produced and marked Exs. R-1 to R-7 in support of his defence that the children are in their custody along with their mother from the date of their birth and they are comfortable. It is also seen from the evidence of R.W.1 that the minor children are being given good education and taken care of by the grand parents. The materials placed by both parties show that father suffers from no legal disqualification and there is no evidence to show that he has bad conduct. It is further seen that their father is a Homeopathy Doctor. It is stated that P.W.1, respondent's father-in-law and maternal grand father of the children is an uneducated man and his maternal grand mother is an Asthma patient. It is also stated that the father had admitted the children in English medium and now they are put in Tamil medium by their grand parents. Though it is stated that the father did not have an independent house with comfortable facilities as that of the in-laws, as observed in the decisions referred to above, financial affluence cannot be a criterion for the custody of the children. It is also the evidence of P.W.1 that a separate new house has been constructed by the father , though it is stated by R.W.1 that the entire funds were provided by him.

14. Apart from all these pros and cons, in the light of the statutory provisions contained in Section 17 of the Act, the welfare of the minor is paramount while considering appointment of guardian of a minor, we summoned the minor children to our chamber. They appeared twice before us. We spent considerable time with them. As on date, the minor daughter is aged about 15 years and minor son is aged about 14 years. We also enquired the father and maternal grandfather. We satisfied that both are intelligent children and they are more matured than their age. Both of them are bitter about their father and they categorically stated that they are not willing to live with their father, but they are very happy with their maternal grand parents who are looking after them very well. We tried to persuade the children to go and live with their father, but they refused to do so at present. After talking to the children, and assessing their state of mind, we are of the view that it would not be in the interest and welfare of the children to hand over their custody to their father G. Anantha Jeyakumar. We are conscious that the father, being a natural guardian, has a preferential right to the custody of his minor children, but keeping in view the facts and circumstances of this

case and the wishes of the children, who according to us, are intelligent enough to understand their well-being, we are not inclined to hand over the custody of A.J. Juno Monisha and A.J. Jason Boss to their father at this stage. We, therefore, dispose of the appeal by issuing the following directions:

(i) We permit the maternal grand-father-M. Varuvel to keep custody of A.J. Juno Monisha and A.J. Jason Boss;

(ii) G. Anantha Jeyakumar, father of the children shall be permitted by the appellant herein to meet the children on holidays or on any other day with prior notice to the appellant; G. Anantha Jeyakumar can take the children out of the appellant's house for recreation, entertainment or for shopping with the concurrence of the children;

(iii) If in due course G. Anantha Jeyakumar wins over the love and affection of the children, he would be at liberty to move this Court for modification of the order regarding custody of the child;

(iv) We set aside the judgment and order dated 30-8-2001 on the file of the Additional District judge, Kanyakumari District, made in O.P.No.32/2001;

(v) We give the parties liberty to move this Court for modification of this order or for seeking any directions regarding the custody and the well being of A.J. Juno Monisha and A.J. Jason Boss, if there is change in the circumstances for the welfare of the children.

15. We, therefore, allow the appeal with the above directions. No order as to costs. Consequently, C.M.P.No. 17364 of 2001 is closed.

R.B.

To:-

The Addl. District Judge, Kanyakumari at Nagercoil with records.

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